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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW JAMES ZAMORA,

Defendant and Appellant.

B266496

(Los Angeles County  
Super. Ct. No. GA086679)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dorothy L. Shubin, Judge. Affirmed as modified.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Matthew James Zamora appeals from a judgment of conviction entered after a jury trial. On appeal, Zamora raises various challenges to his conviction and sentence. While we affirm Zamora's conviction, we modify the judgment to stay execution of the sentence on one of Zamora's convictions.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Fight*

Joseph Romero lived with Joanna Cardona and their daughter in Temple City, next to a liquor store. Romero was five feet nine inches tall, weighed approximately 200 pounds, and could be violent. For example, in 2009, when Cardona was eight months pregnant, Romero hit her in the stomach with an umbrella. After their daughter was born, Romero attacked Cardona, dislocating her shoulder and tearing a tendon.

On the morning of June 16, 2012 Romero and Cardona left the house to do some shopping for their daughter's third birthday, which they planned to celebrate later that day. Romero did not have any weapons with him.

As Romero and Cardona were driving home after shopping, they saw Krisanto Morinico, a friend of Romero's, riding his bicycle. They invited him to the birthday party and continued on their way. As they neared their home, Cardona saw two men, later identified as Zamora and Daniel Martinez, standing on the sidewalk and looking at Romero. Romero had never seen either of them before. One of the men was carrying a case of beer. Cardona, who was driving, pulled into the liquor store parking lot

because she was concerned for her safety and did not want the men to see where she lived.

Romero got out of the car. Zamora and Martinez faced him and asked, “Where you from?” Romero did not respond. Cardona thought she heard Martinez say they were from Duarte. The men started exchanging words with Romero, and a fight broke out on the sidewalk in front of Romero and Cardona’s house.

While Romero was fighting with Martinez, Morinico rode up on his bicycle. He tried to stop the fight, but began fighting with Zamora. According to Morinico, when he arrived, both Martinez and Zamora were fighting with Romero.<sup>1</sup> Zamora came up to Morinico, looking as if he were going to hit him. Morinico, who was six feet four inches tall and weighed 220 pounds, punched Zamora, who was five feet five inches tall and weighed about 140 pounds, knocking him down. Zamora got up and tried to fight, but Morinico knocked him down again. This occurred four times, with Morinico asking Zamora whether he had had enough. Morinico did not think he injured Zamora until the last time he hit him. Zamora grabbed his face and said, “Oh, that really hurts.” Morinico thought he knocked out one of Zamora’s teeth, but he did not see any blood on Zamora’s face. Morinico told Zamora to stop fighting and said he was not trying to hurt him. Zamora tried to get past Morinico to join in the fight

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<sup>1</sup> Martinez testified it was Romero who asked him and Zamora where they were from and then yelled, “El Monte Flores,” a gang name. Martinez said Romero approached Zamora and hit him before Zamora could say anything. According to Martinez, Romero fought with Zamora until Morinico arrived and hit Zamora from behind, and then Martinez began fighting with Romero.

between Romero and Martinez, which it appeared to Morinico Romero was winning. Morinico told Zamora to let Martinez take care of himself.

Cardona tried to help Romero by kicking Martinez. Romero pinned Martinez to the ground, and Martinez called to Zamora, “Huero, help me.”<sup>2</sup> Eventually, the fight ended. Morinico made sure everyone shook hands, although Martinez and Zamora were not happy about doing so. Cardona and Morinico noticed that Zamora had blood on his face, and his teeth looked crooked or distorted. Morinico rode away on his bicycle because he did not want to be involved with Martinez, Zamora, and Romero, who were still arguing, or the police.

A neighbor, Kenny Guzman, was awakened by the sound of arguing. He looked outside and saw Romero and Zamora arguing and Martinez standing nearby. Guzman heard someone yell “Duarte.” He did not see the fistfight, but Romero came to the front of his house and told him that he had just been in a fight and had held one of the men on the ground. Guzman did not see any injuries on Romero. Eventually, Romero and Cardona drove to the house of Romero’s mother to get out of the area.

Martinez and Zamora also left the area. Martinez was concerned about their safety and did not want the police to stop him because he was on parole and had a daughter. Martinez and Zamora went to the apartment of Chris Flores, which was a five- or six-minute walk from the liquor store. Flores and Francisco

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<sup>2</sup> “Huero” means “white.” Zamora has lighter skin than Martinez.

Salazar were at the apartment.<sup>3</sup> Zamora, who was angry Morinico had knocked him down, called his mother about going to the dentist. When Zamora's mother arrived, Zamora told Salazar, "Let's ride." Someone may have also said, "Yes, like Bonnie and Clyde." Zamora left in his mother's car, and Salazar left on his bicycle.

B. *The Murder*

Romero and Cardona returned to their house after half an hour because they were expecting a delivery. Cardona parked in the driveway, and they went into the house. A short time later, Cardona told Romero that Martinez was outside on his bicycle. Romero went outside.

Guzman was also outside, and he and Romero started walking toward the liquor store. Zamora approached them and said, "Come here." As they walked toward Zamora, Romero pushed Guzman behind him. Zamora pulled a gun from his waistband and shot six times in Romero's direction. Guzman and Romero started to run, but Romero fell to the ground. Cardona came outside and ran to Romero, who was lying on the ground, bleeding from his head. She started crying and tried to lift him up. Zamora ran away.

Romero died as a result of gunshot wounds to his back and neck. He also had abrasions consistent with having been in a fight.

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<sup>3</sup> Martinez and Salazar had been at Flores's apartment the previous evening. Martinez saw a revolver and a semiautomatic gun there.

### C. *The Investigation*

Sergeant David Cortinas of the Los Angeles County Sheriff's Department reviewed the video recordings from security cameras inside and outside the liquor store. The recordings showed Zamora and Martinez entering the store at 10:09 a.m., Martinez purchasing a case of beer, and the two leaving the store at 10:23 a.m.

The video recordings also showed Zamora returning to the liquor store at 11:18 a.m., someone riding by the store on a bicycle at 11:22 a.m., and Zamora leaving the store and walking out of view of the security camera. The recordings showed Zamora reappearing on the sidewalk at 11:24 a.m., walking out of view, and then walking across the driveway into the parking lot while holding a gun at 11:25 a.m. The recording then showed Zamora starting to run, disappearing from view, running back a few seconds later, and disappearing from view again.

Criminalists collected four blood samples at the scene of the shooting and determined blood found on the sidewalk matched Zamora's. After examining bullet holes and bullets recovered from the scene, they concluded three shots were fired from a .38 special or .357 magnum from the general direction of the front of the liquor store.

Sergeant Helen Ewell went to the murder scene and observed three bullet holes in a nearby house. She interviewed Morinico, who, from photographs taken from the liquor store video, identified Martinez as the man who fought with Romero. Sergeant Ewell also interviewed Martinez, who said he was the one who first used the term "ride," which to him meant that a person would go with him to ride like Bonnie and Clyde.

D. *The Resistance and Escape*

Deputy Valerie Meza and her partner, Deputy Klinski, took Zamora into custody at Flores's apartment on the morning of June 17, 2012. They handcuffed him and placed him in the back of their patrol car. Because Zamora said he had asthma, the deputies took him to the hospital to get medical clearance to book him. Deputy Meza noted that Zamora had a cut on his upper lip and a scrape on his left leg.

The deputies took Zamora to the emergency room and handcuffed him to a gurney. After a doctor examined Zamora and cleared him for booking, Deputy Klinski unlocked the handcuffs from the gurney. Zamora spun around, pushed Deputy Klinski aside and ran toward the doorway, where Deputy Meza was standing. He pushed Deputy Meza out of the way with his hands. She stumbled backwards, started to fall, and grabbed the back of Zamora's shirt as she fell. Zamora broke free and ran toward the exit. Deputy Klinski ran after him and yelled at him to stop. When Zamora failed to do so, Deputy Klinski tackled him and knocked him to the floor. Deputy Meza handcuffed Zamora's hands behind his back and put restraints on his ankles. The deputies carried Zamora out because he refused to walk.

Deputy Meza injured her finger in the scuffle with Zamora. She had to wear a splint on the finger and missed a few weeks of work because of the injury.

E. *Zamora's Version*

Zamora testified at trial in his defense. Zamora's version of the events began with his visit to Flores's apartment the day before the shooting. He saw a revolver there but did not see a semiautomatic. After partying all night, he and Martinez walked

to the liquor store in the morning. Martinez bought a case of beer, and Zamora bought candy and a lottery ticket.

As Zamora and Martinez left the liquor store, Cardona slowly drove by them, and Romero said something out the window. Zamora did not know Romero. Zamora heard something behind him, turned around, and saw Romero jogging toward him. Zamora, who was younger and smaller than Romero, was afraid. Romero asked Zamora what he was looking at, said "This is Flores," and began hitting Zamora in the face.

Morinico rode up on a bicycle, got off, and punched Zamora in the head, knocking him down. Martinez joined in the fight and began fighting with Romero. Zamora fought with Morinico, who kept knocking him down. Zamora tried to get up because Martinez was calling for help, but Morinico knocked him down again. Morinico punched Zamora in the mouth, chipping and breaking his teeth. Zamora was spitting blood.

The fight ended with Romero and Morinico winning. Morinico wanted to shake hands, but Zamora was afraid of him and did not want to be near him. Martinez picked up his beer, and he and Zamora started to walk away. Romero was yelling and cursing at them. Zamora was afraid and walked away.

When Zamora returned to Flores's apartment, he saw blood on his face and shirt. His lip was swollen, and he had missing and chipped teeth. When he inhaled and the air hit his teeth, he felt pain. He also had pain in his head, leg, and knee. He called his mother and told her he needed to go to the dentist because he had been in a fight and his teeth were broken.

Before going to the dentist, Zamora wanted to go back to the scene of the fight to find his missing teeth. He was afraid, but Salazar said he would go with him. Zamora took the revolver



for protection and put it in his pocket. When his mother arrived at the apartment, he got in her car and asked her to take him to look for his teeth. Salazar followed on his bicycle.

Zamora's mother drove to the liquor store, and Salazar rode there on his bicycle. Zamora got out of his mother's car and started to look for his teeth. He was in pain, and his head was "fuzzy" and confused. Salazar left when Zamora could not find the teeth. As Zamora walked back to his mother's car, he remembered the location of the fight, turned around, and saw Romero and Guzman walking toward him. Zamora was scared because Romero was acting aggressively. Romero pushed Guzman behind him and moved forward. Zamora was afraid Romero was going to fight him and did not want to get beaten again. Zamora pulled out the revolver, fired two shots, and Romero started running. Zamora could not remember if he went after Romero or how many shots he fired, because everything happened quickly. He never intended to kill anyone, and he did not intend to shoot Guzman. After shooting, he turned and ran past his mother's car. He threw the gun into a bush.

The following day, sheriff's deputies took Zamora to the hospital. A doctor treated his asthma and a cut on his leg. The doctor also put "glue" on the back of his teeth and gave him Vicodin for pain, and his mouth felt better.<sup>4</sup>

After Deputy Klinski unlocked the handcuffs on the gurney, Zamora ran because he was scared and did not want to go to jail. Deputy Meza was in the doorway, and he tried to get around her. He pushed her, and she grabbed his shirt. When the

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<sup>4</sup> Zamora required several visits to the dentist for treatment of his dental injuries.

shirt ripped, she stumbled and fell. Zamora continued running, but Deputy Klinski tackled him and held him on the floor. Deputy Meza then helped Deputy Klinski handcuff him and put a leash around his legs so he could not move his feet.

F. *Sandra Zamora's Testimony*

Zamora's mother, Sandra, testified that Zamora called her and told her he had been in a fight, his front teeth were broken, and he had to see a dentist right away. She drove to pick him up at his friend's apartment, which was near the liquor store. When he came out, she saw his mouth was bloody, his lips were swollen, and his front teeth were missing. He said he was in pain. He asked her to drive him to where the fight had occurred so he could look for his teeth. She drove to an area near the liquor store and waited while Zamora walked in circles, looking for his teeth.

Sandra heard a bang and looked up. She saw Zamora shooting and running, and she saw someone else running away from him. Zamora ran past her car, and Sandra saw a gun in his hand.

G. *Charges, Conviction, and Sentence*

The People charged Zamora with the murder of Romero (Pen. Code, § 187, subd. (a))<sup>5</sup> and the attempted murder of Guzman (§§ 187, subd. (a), 664). The People alleged Zamora personally and intentionally used and discharged a firearm causing death or great bodily injury to Romero and Guzman. (§ 12022.53, subds. (b), (c), (d).). The People further alleged

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<sup>5</sup> Undesignated statutory references are to the Penal Code.

Zamora committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by the gang, within the meaning of section 186.22, subdivision (b)(1)(C). The People also charged Zamora with resisting an executive officer (§ 69) and misdemeanor escape from arrest (§ 836.6, subd. (b)).

The jury found Zamora not guilty of first degree murder but guilty of second degree murder, and found true the firearm allegations. The jury found not true the criminal street gang allegation. As to Guzman, the jury found Zamora not guilty of attempted murder or the lesser included offense of attempted voluntary manslaughter. The jury also found Zamora guilty of escape from arrest and resisting an officer.

The trial court sentenced Zamora to 15 years to life for the murder of Romero, plus 25 years for the firearm use enhancement.<sup>6</sup> The court imposed a concurrent term of 364 days for escape and a concurrent term of two years for resisting arrest. Zamora timely appealed.

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<sup>6</sup> Section 12022.53, subdivision (d), requires imposition of “an additional and consecutive term of imprisonment in the state prison for 25 years *to life*.” (Italics added.) The trial court did not specify that the enhancement was 25 years to life, although it stated that the sentence imposed was 40 years to life, and the abstract of judgment does not state that the enhancement is 25 years to life. We will modify the judgment to impose the legally-required enhancement. (See *People v. Harbison* (2014) 230 Cal.App.4th 975, 986 [“[w]hen sentencing error does not require additional evidence, further fact finding, or further exercise of discretion, the appellate court may modify the judgment appropriately and affirm it as modified”].)

## DISCUSSION

### A. *The Trial Court Did Not Abuse Its Discretion in Denying Zamora’s Request To Exclude Romero’s Family and Friends During Sandra’s Testimony*

#### 1. *Relevant Proceedings*

After jury selection, counsel for Zamora informed the court that Sandra was “extremely fearful about retaliation against her.” Counsel represented that when Sandra came to court for the arraignment, “she saw the decedent’s friends and family near the elevators. Some of them had El Monte Flores [gang] tattoos on their heads. One of the females that was friends or family with the decedent tried to take her photograph near the courtroom.” Counsel stated that Sandra’s brother-in-law, who knew Romero’s family, had told her “that they want revenge any way that they can get it. Her ex-husband and two of her children have already left the state. And, basically, she stays at home and she’s fearful for leaving all together.” Relying on *People v. Esquibel* (2006) 143 Cal.App.4th 645,<sup>7</sup> counsel requested that, during Sandra’s testimony, “anybody in the courtroom that is

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<sup>7</sup> The United States Supreme Court granted certiorari in *Esquibel* (see *Esquibel v. California* (2007) 550 U.S. 967), vacated the judgment, and remanded the case for further consideration in light of *Cunningham v. California* (2007) 549 U.S. 270. On remand, the court stated it was adopting and restating that portion of its original decision holding that the trial court improperly excluded two spectators from the trial (although the court did not actually restate it). (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 546.)

friends or family . . . of the decedent be asked to leave the courtroom just during the portion of her testimony.” Counsel for Zamora added that Sandra “has young children, she takes care of . . . her mother who is suffering from pretty extreme Alzheimer[’s]/dementia, and she has to be by her side. She’s afraid of being a target. She can’t leave her mother and flee like her ex-husband and two of her children already have. So she’s very, very concerned about her personal safety.”

The prosecutor stated he was unaware of any threats against Sandra. The prosecutor argued, “It’s a public courtroom. And I can’t ask the mom and the family who have been coming to every court appearance not to attend the whole trial. I don’t see there’s good cause [for exclusion] here because they’re not gang members, and they’re not threatening anybody.”

Counsel for Zamora stated she was concerned not about anything happening inside the courthouse but about something happening outside the courthouse. Although Romero’s family and friends did not yet know that Sandra would be a witness or how she would testify, there had already been threats of retaliation. Counsel for Zamora argued that sections 868 and 868.7 allowed the court to exclude members of the victim’s family under certain circumstances.

At a subsequent hearing, the prosecutor stated that all of the statements he had heard about a threat against Sandra were “secondhand accounts.” He argued the only people he had seen in court were Romero’s mother, sister, and brother, none of whom had any gang affiliation or had disrupted the proceedings. The prosecutor said he could not “see how the court can exclude them. They’re not making threats, and they’re just spectators and here to seek justice for the family member.” He argued, “Without

more, your honor, I don't think that there's a basis for it. . . . [A] broad, blanket excusal or dismissal of all these people is unfair and goes against the victim's rights in this case to be present when the court hearings are being conducted."

The trial court denied Zamora's request to exclude Romero's family from the courtroom. The court concluded sections 868 and 868.7 did not apply and *Esquibel* was distinguishable. The court found no reason to exclude Romero's family members: "There's certainly no showing that the particular people who are sought to be excluded had done anything untoward or anything intimidating." The court also ruled that, to the extent there was a concern about Sandra's safety in the courthouse, a deputy would meet her at the courthouse when she arrived, escort her to the courtroom, remain in the courtroom during her testimony, and then escort her out of the courthouse. In addition, the courtroom deputy could "keep an eye on people who are in the audience." The court noted that, if Sandra were "concerned that the contents of her testimony will be learned by people outside the courtroom, that's true whether or not people are in the courtroom listening to it or not. Anyone who's here in the courtroom is free to report that testimony to whoever they wish. The public can order a transcript. So there's nothing about the content of her testimony that won't be virtually immediately available to anyone who wishes to be privy to it."

## 2. *Applicable Law*

The federal and state constitutions guarantee the defendant and the public a public trial. (U.S. Const., 6th & 14th Amendments; Cal. Const., art. I, § 15; *People v. Scott* (2017) 10 Cal.App.5th 524, 529-530; *People v. Esquibel*, *supra*, 143

Cal.App.4th at pp. 654-655; see *People v. Woodward* (1992) 4 Cal.4th 376, 383 “[t]he general trend of the cases appears to be toward *expanding* application of the public trial right”]; accord, *People v. Bui* (2010) 183 Cal.App.4th 675, 680.) “[T]he United States Supreme Court ‘has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care.’” (*People v. Esquibel*, *supra*, 143 Cal.App.4th at p. 655.) “Consequently both the defendant’s and the public’s right may be subjected to reasonable restrictions that are necessary or convenient to the orderly procedure of trial, and the trial court retains broad discretion to control courtroom proceedings in a manner directed toward promoting the safety of witnesses.” (*People v. Pena* (2012) 207 Cal.App.4th 944, 949.)

“In general, there are two types of exclusions: a total closure where all spectators are directed to leave the courtroom and a partial closure where some, but not all, spectators are asked to leave. The total closure of the courtroom is almost always a per se violation of the constitutional rights of the accused. In the case of a partial closure, the Sixth Amendment public trial guarantee creates a ‘presumption of openness’ that can be rebutted only by a showing that exclusion of the public was necessary to protect some ‘higher value’ such as the defendant’s right to a fair trial, or the government’s interest in preserving the confidentiality of the proceedings. [Citation.] When such a ‘higher value’ is advanced, the trial court must balance the competing interests and allow a form of exclusion no broader than needed to protect those interests. [Citation.]

Specific written findings are required to enable a reviewing court to determine the propriety of the exclusion. [Citation.] There is also a sub-category of the partial closure which includes the circumstances of this case where only certain identified spectators are excluded.” (*People v. Esquibel*, *supra*, 143 Cal.App.4th at p. 656, fn. omitted.) “[A]n accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.” [Citations.] The application of the above principles and the issue whether an accused has been denied his constitutional right to a public trial cannot be determined in the abstract, but must be determined by reference to the facts of the particular case.” (*Ibid.*, italics omitted, quoting *In re Oliver* (1948) 333 U.S. 257, 271-272.)

### 3. *The Trial Court Did Not Abuse Its Discretion*

Zamora relies principally on *People v. Esquibel*, *supra*, 143 Cal.App.4th 645. In that case the prosecutor asked the court to exclude from the courtroom two of the defendant’s friends while a seven-year-old boy was testifying because the child’s mother was “concerned about retaliation in the neighborhood.” (*Id.* at p. 650.) The defendant objected, arguing there was no evidence the two friends had intimidated or threatened the child. (*Ibid.*) The trial court granted the prosecutor’s request because the witness was so young and the court wanted the witness to “relax as much as possible” while testifying. (*Id.* at p. 652.)

The court held the exclusion of the defendant’s two friends “during the testimony of a single minor witness” did not violate the defendant’s constitutional right to a public trial. (*People v. Esquibel*, *supra*, 143 Cal.App.4th at pp. 657, 658.) The court explained, “There was no order excluding the press or the public



in general. Except for these two spectators, no one else connected with [the defendant] was excluded from the courtroom and the exclusion was only for the testimony of the single witness. Members of [the defendant's] family remained in the courtroom. There was no showing that the excluded individuals had any special relationship to [the defendant] or were needed to provide him support during the trial." (*Ibid.*) The court concluded "the partial closure of a trial by the temporary exclusion of select supporters of the accused does not create an automatic violation of the constitutional right to a public trial. Furthermore, on the facts of this case, . . . there was no constitutional violation of [the defendant's] rights. To hold otherwise would not serve the purposes of the public trial right. Here, the exclusion of the spectators was for a minimal amount of time and [the defendant's] family supporters remained in the courtroom." (*Ibid.*) The court also held that, although the exclusion of the defendant's friends did not comply with section 686.2, that statute did not apply because there was no evidence the two individuals had engaged in intimidation of the witness. (*Id.* at p. 659.) Rather, "[t]hey were excluded based solely on the concerns of the witness's mother," whose "principal concern in this gang related case was that the spectators may be gang members and would recognize her child in the neighborhood." (*Id.* at pp. 657, 659.)

Zamora argues he provided the trial court "with facts which supported the defense motion for a limited exclusion of a small group of the public for a minimal amount of time—only during Sandra's testimony." Had the trial court granted such a motion based on those facts, we might have held, consistent with *Esquivel*, that the trial court did not abuse its discretion and did

not violate the parties' or the public's constitutional right to an open trial. But contrary to Zamora's contention, *Esquibel* does not require the exclusion of non-disruptive spectators whenever a witness feels intimidated by their presence. *Esquibel* does require "a full evaluation of the necessity for the exclusion and the alternatives that might be taken," and states that such an evaluation "should be reflected in the record of the proceedings." (*People v. Esquibel*, *supra*, 143 Cal.App.4th at p. 659.) Which is precisely what the trial court did in this case. The court evaluated counsel for Zamora's request, observed the proceedings in the courtroom, considered the alternatives, and implemented a procedure that would protect Sandra from any intimidation or harassment in the courthouse. The trial court did not abuse its discretion by choosing this alternative rather than excluding Romero's family and friends during Sandra's testimony. (See *People v. Carrasco* (2014) 59 Cal.4th 924, 955 ["abuse of discretion standard is used in many other contexts and reflects the trial court's superior ability to consider and weigh the myriad factors that are relevant to the decision at hand"]; accord, *People v. Lancaster* (2007) 41 Cal.4th 50, 71; see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 713 [appellate courts apply abuse of discretion standard "precisely because trial courts are in a better position than appellate courts to assess witness credibility, make findings of fact, and evaluate the consequences of a potential conflict in light of the entirety of a case, a case they inevitably will be more familiar with than the appellate courts that may subsequently encounter the case in the context of a few briefs, a few minutes of oral argument, and a cold and often limited record"].)

Zamora “further suggests that if the trial court had concerns about the validity of defense counsel’s representations, the court should have conducted a hearing pursuant to section 686.2.” Section 686.2 provides in pertinent part: “(a) The court may, after holding a hearing and making the findings set forth in subdivision (b), order the removal of any spectator who is intimidating a witness. [¶] (b) The court may order the removal of a spectator only if it finds all of the following by clear and convincing evidence: [¶] (1) The spectator to be removed is actually engaging in intimidation of the witness. [¶] (2) The witness will not be able to give full, free, and complete testimony unless the spectator is removed. [¶] (3) Removal of the spectator is the only reasonable means of ensuring that the witness may give full, free, and complete testimony.”

The trial court, however, was not concerned with the validity of counsel for Zamora’s representations, which related to Sandra’s alleged fear of retaliation from Romero’s family and friends. The court was concerned about the lack of any indication that Romero’s family or friends were engaging in intimidating conduct in the courtroom. The court, accepting the validity of counsel for Zamora’s representations, offered to have a deputy escort Sandra to and from the courtroom and observe the spectators in the courtroom to ensure none of them engaged in disruptive or threatening behavior. Absent any evidence Romero’s friends and family were engaged in intimidating conduct, the trial court did not abuse its discretion in taking measures to address the situation without conducting a hearing under section 686.2. (Cf. *People v. Johnson* (2015) 242 Cal.App.4th 1155, 1164 [party seeking a hearing on a motion to disqualify the prosecutor must make a prima facie showing of

facts that would justify disqualification]; *People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1069 [hearing on a motion for substitution of counsel is required “when there is a sufficient showing that the defendant[']s right to the assistance of counsel will be substantially impaired if his request is denied”].)

Finally, Zamora has not shown the trial court’s selection of an alternative to excluding Romero’s friends and family during Sandra’s testimony prevented Sandra from testifying, affected her testimony, or infected the trial with such unfairness that it violated Zamora’s constitutional right to a fair trial. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1219 [prosecutorial misconduct violates the Fourteenth Amendment if it “infects the trial with such unfairness as to render the subsequent conviction a denial of due process”]; *People v. Bolden* (2002) 29 Cal.4th 515, 544 [because any error “did not significantly affect defendant’s ability to present a defense, it did not violate any of defendant’s rights under the federal Constitution”].)

B. *Substantial Evidence Supported Zamora’s Conviction for Escape from Arrest*

Section 836.6, subdivision (b), provides: “It is unlawful for any person who has been lawfully arrested by any peace officer and who knows, or by the exercise of reasonable care should have known, that he or she has been so arrested, to thereafter escape or attempt to escape from that peace officer.” Zamora contends the evidence is insufficient to support his conviction for violating this section because (1) the evidence did not establish he was “lawfully arrested” and (2) the evidence did not establish he

actually escaped, rather than attempted to escape.<sup>8</sup> Neither contention has merit.

In determining whether there is sufficient evidence to support a conviction, “we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Our review must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.) ““Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] A reversal for insufficient evidence “is unwarranted unless it appears ‘that

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<sup>8</sup> The jury was instructed pursuant to CALCRIM No. 2762: “The defendant is charged in Count 4 with escape following an arrest in violation of Penal Code section 836.6. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant was lawfully arrested by a peace officer and the defendant knew, or reasonably should have known, that he had been arrested; [¶] AND [¶] 2. The defendant escaped from the custody of the peace officer. [¶] Escape means the unlawful departure from the physical limits of custody. [¶] A sworn member of the Los Angeles County Sheriff’s Department is a peace officer.” Although section 836.6 requires either an actual escape or an attempt to escape, the court instructed the jury only on actual escape.

upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; accord, *People v. Cravens* (2012) 53 Cal.4th 500, 508.) “[T]he relevant inquiry on appeal is whether, in light of all the evidence, ‘any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.’” (*Zaragoza*, at p. 44.)

1. *There Was Substantial Evidence Zamora Was Under Arrest*

“An arrest is taking a person into custody, in a case and in the manner authorized by law.” (§ 834.) It “is made by an actual restraint of the person, or by submission to the custody of an officer.” (§ 835; see *People v. Boren* (1987) 188 Cal.App.3d 1171, 1177 [“[t]he essential elements of an arrest are: ‘(1) taking a person into custody; (2) actual restraint of the person or his submission to custody’”]; accord, *People v. Natale* (1978) 77 Cal.App.3d 568, 572; *People v. Hatcher* (1969) 2 Cal.App.3d 71, 75.) “[C]ustody occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.” (*People v. Davis* (1981) 29 Cal.3d 814, 821, fn. 3; see *People v. Nicholson* (2004) 123 Cal.App.4th 823, 832 [“‘[i]n custody’ implies that a person ‘is detained or kept in the charge or control of another, in some sort of restraint,’ so that the person ‘is not free to come and go’ at will”].) “Handcuffing . . . is a distinguishing feature of a formal arrest.” (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404-1405.)

Zamora acknowledges he was in custody. He argues, however, that “[i]n the absence of testimony from Deputy Meza

that [he] had been arrested, the facts cannot support that conclusion.” Rather, according to Zamora, the facts only support the conclusion he had been detained.

The distinction between an arrest and a detention usually arises in Fourth Amendment cases. ““For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police ‘contacts’ or ‘interactions’ with individuals, ranging from the least to the most intrusive. First, there are . . . ‘consensual encounters’ . . . , which are those police-individual interactions which result in no restraint of an individual’s liberty whatsoever—i.e., no ‘seizure,’ however minimal—and which may properly be initiated by police officers even if they lack any ‘objective justification.’ . . . Second, there are what are commonly termed ‘detentions,’ seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police ‘if there is an articulable suspicion that a person has committed or is about to commit a crime.’ . . . Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual’s liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime.”” (*People v. Hughes* (2002) 27 Cal.4th 287, 327-328.) “The distinction between a detention and an arrest ‘may in some instances create difficult line-drawing problems.’” (*People v. Celis* (2004) 33 Cal.4th 667, 674, quoting *United States v. Sharpe* (1985) 470 U.S. 675, 685; see *In re Antonio B.* (2008) 166 Cal.App.4th 435, 440 [“there is no hard and fast line to distinguish permissible

investigative detentions from impermissible de facto arrests,” and “the issue is decided on the facts of each case”].)

There are no such difficulties here. Deputies Meza and Klinski took Zamora into custody at Flores’s apartment. They handcuffed him and placed him in the back of their patrol car. They took him to the hospital to get medical clearance to book him. The deputies were not temporarily detaining Zamora for the purpose of making reasonable inquiries or transporting him to the hospital for the sole purpose of obtaining medical treatment. They did not handcuff him out of concern for their safety. Rather, they put Zamora in handcuffs and drove him to the hospital so they could take him to jail for booking. This was an arrest. The fact Deputy Meza did not tell Zamora he was under arrest or did not state in her testimony she placed Zamora under arrest does not preclude a finding that he was under arrest. (See *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 84 [“[t]here are no magic words necessary” for an arrest].) Zamora certainly understood he was under arrest: He testified he ran from Deputy Klinski because he was scared and did not want to go to jail. There was substantial evidence to support the jury’s finding that Zamora was under arrest.

## 2. *There Was Substantial Evidence Zamora Escaped from Arrest*

Escape is an unauthorized or unlawful departure from the limits of custody. (*People v. Bailey* (2012) 54 Cal.4th 740, 748-749; *People v. Allen* (2016) 6 Cal.App.5th 1, 4; *People v. Lavaie* (1999) 70 Cal.App.4th 456, 460.) Zamora argues “the evidence clearly established that [he] did not escape from the physical limits of custody.” Zamora contends that he never escaped from



custody because “[h]e ran from Deputy Klinski directly into the arms of Deputy Meza. And while he was able to, for an instant, break from her grasp, he traveled only a few more feet before he was brought down by Klinski. He momentarily escaped their grasp, but he never escaped from their custody.”

There was substantial evidence, however, that Zamora unlawfully departed from the limits of custody imposed by the two deputies. Zamora escaped when he broke free from the grasp of the deputies and began running toward the hospital exit. He was no longer in their control or restrained by them. As soon as Deputy Klinski removed Zamora’s handcuffs, Zamora used force to exceed the limits of custody imposed by the deputies. Zamora actually made it past the second deputy and was free, albeit briefly, to proceed to the exit. That Deputy Klinski was able to come from behind, overcome him, and take him back into custody was a tribute to the deputies’ alacrity. It did not preclude a reasonable trier of fact from finding that Zamora escaped from the deputies’ custody.

*People v. Bailey, supra*, 54 Cal.4th 740, on which Zamora relies, involved a conviction of escape from prison in violation of section 4530, subdivision (b).<sup>9</sup> The defendant in that case cut through the bars on his cell window and several fences but was still on prison property. In connection with holding that attempt to escape is not a lesser included offense of escape (*People v.*

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<sup>9</sup> Section 4530, subdivision (b), provides: “Every prisoner who commits an escape or attempts an escape as described in subdivision (a), without force or violence, is punishable by imprisonment in the state prison for 16 months, or two or three years to be served consecutively. . . .”

*Bailey, supra*, 54 Cal.4th at pp. 744, 747), the Supreme Court stated that the “crime [of escape] is completed when the prisoner wilfully leaves the prison camp, without authorization. . . .” (*Id.* at p. 749.) From this statement Zamora argues: “*Bailey* makes clear that a prison escape requires one to actually pass either the security perimeter of the correctional facility, or leave the facility itself. Analogously, for a charge of escape under section 836.6, the instruction informs that the defendant had to have escaped from the custody of the peace officer.” And, according to Zamora, he “never accomplished that escape.”

*Bailey* does not support Zamora’s argument. The focus of *Bailey* is on the defendant’s location, not the amount of time the defendant is free from custody or manages to avoid recapture. (See *People v. Bailey, supra*, 54 Cal.4th at p. 749.) Nothing in the Supreme Court’s opinion in *Bailey* suggests that, if a prisoner leaves the physical confines of a prison but is recaptured shortly afterward, so the defendant has not escaped. Zamora cites no authority for his assertion that breaking free from the custody of the deputies “for an instant” is not an escape. There was substantial evidence that Zamora escaped.

C. *The Trial Court Did Not Abuse Its Discretion in Excluding Evidence of Romero’s Prior Conviction*

1. *Relevant Proceedings*

Cardona testified on cross-examination that Romero was not “a violent guy.” The prosecutor objected, and the trial court sustained the objection. Counsel for Zamora, outside the presence of the jury, advised the court that Romero had a prior conviction for willful infliction of corporal injury on a spouse or

cohabitant with great bodily injury, which counsel for Zamora argued was admissible under Evidence Code section 1103 to prove conduct in conformity with a character trait for violence. The prosecutor objected, arguing that the conviction was hearsay and inadmissible under Evidence Code section 352, and that Zamora should have raised the issue of admissibility of Romero's prior conviction at a pretrial hearing under Evidence Code section 402. The trial court stated it would look into the matter and have further argument later.

During a subsequent discussion, counsel for Zamora explained that Romero's conviction was based on an attack on Cardona. The court asked why the fact of a conviction—as opposed to the acts by Romero—was relevant. Counsel for Zamora stated that she understood the trial court's point and that her intention was to discuss with Cardona Romero's prior acts and use the prior conviction for impeachment. The prosecutor reiterated his objection under Evidence Code section 352, arguing the conviction was not relevant because it was not based on a violent act against Zamora and would confuse and mislead the jury.

After further argument, the trial court ruled that under Evidence Code section 1103, subdivision (a)(1), Zamora could introduce evidence of “two specific acts” by Romero, “one about beat[ing] up and dislocat[ing Cardona's] shoulder or hurt[ing] her shoulder and the other one the three months prior,” to show a character trait for violence and that he acted in conformity with that character trait. The court excluded evidence of violence in general under Evidence Code section 352 as unduly time consuming and misleading to the jury. The court also excluded

the fact of the conviction. The court stated it would reconsider its ruling if Cardona denied the acts.

## 2. *Analysis*

Evidence Code section 1103, subdivision (a)(1), provides that, “[i]n a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is . . . [o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character.” Nonetheless, “the trial court may exclude otherwise admissible evidence pursuant to Evidence Code section 352 if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative.” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828; see *People v. Frazier* (2001) 89 Cal.App.4th 30, 40.)

As a general rule, “we apply ‘the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.’” (*People v. Thompson* (2016) 1 Cal.5th 1043, 1120.) “In applying the abuse of discretion standard, a reviewing court does not wholly replace the trial court’s judgment with its own; if a reasonable basis existed to exclude a statement, that means the trial court did not abuse its discretion in doing so, even assuming that a reasonable argument also existed for admitting it.” (*People v. Grimes* (2016) 1 Cal.5th 698, 741; see *People v. Valdez* (2012) 55 Cal.4th 82, 144 [that a trial court could have reached one conclusion on the admissibility of evidence does

“*not* show that a court was unable to arrive at the opposite conclusion”].)

Consistent with Evidence Code section 1103, subdivision (a)(1), the trial court admitted evidence of Romero’s violent acts that served as the basis for his conviction of willful infliction of corporal injury on a spouse or cohabitant. Zamora nonetheless argues the trial court abused its discretion in excluding evidence of the conviction, asserting it was admissible “under multiple theories.”

Zamora first asserts that the evidence was admissible to impeach Cardona’s testimony that Romero was not “a violent guy.” Because the trial court sustained the prosecutor’s objection to that testimony, however, there was no reason for Zamora to impeach it. In any event, the trial court stated it would consider admitting evidence of the conviction if Cardona denied that Romero had engaged in violent acts against her. Because Cardona subsequently admitted the acts of violence had occurred, there was no need to impeach her with the conviction.

Zamora also argues there is “nothing in the plain language of Evidence Code section 1103 which precludes the introduction of a victim’s conviction.” That the evidence of Romero’s conviction may have been admissible (see *People v. Koontz* (2002) 27 Cal.4th 1041, 1084 [prosecution was permitted under Evidence Code section 1103, subdivision (a), to present evidence of the defendant’s armed robbery conviction to show his character for violence]) does not establish that the trial court abused its discretion in excluding it (see *People v. Valdez, supra*, 55 Cal.4th at p. 144). The same is true for Zamora’s assertions that Romero’s conviction involved moral turpitude, was relevant, and was subject to judicial notice. None of these assertions proves the

trial court abused its discretion by admitting evidence of Romero's violent conduct under Evidence Code section 1103, subdivision (a)(1), but excluding evidence of Romero's conviction under Evidence Code sections 352.

Because the trial court did not abuse its discretion in excluding the evidence of Romero's conviction, and because Zamora was able to introduce evidence of Romero's violent character, there was no violation of Zamora's constitutional right to present a defense. (See *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1064 ["excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense"]; *People v. Mestas* (2013) 217 Cal.App.4th 1509, 1517 [exclusion of evidence under Evidence Code section 1103 did not violate the defendant's right to a fair trial].)

D. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of the Gun and Holsters Found in Flores's Apartment*

Sheriff's deputies went to Flores's apartment to conduct a parole or probation compliance check. They detained Zamora and other individuals there while they searched the apartment. The deputies found a gun, a magazine, and two holsters in the apartment. During the People's case (and before Zamora testified), counsel for Zamora objected under Evidence Code section 352 to the admission of the photographs of and testimony about the semiautomatic gun and holsters found during the search of Flores's apartment. Counsel for Zamora argued the evidence "would do nothing but confuse the jury, and it's not relevant," because the evidence showed Romero was killed with a revolver.

The trial court found the evidence was relevant and admitted it. The court ruled the photographs corroborated Martinez's testimony about the weapons he saw at the apartment and showed that, after the murder, "there was one there and one that was not." The court found the admission of the evidence would not create a substantial danger of confusing the issues or misleading the jury, nor would it consume an undue amount of time. We review the trial court's rulings on relevance and admissibility under Evidence Code section 352 for abuse of discretion. (*People v. Thompson*, *supra*, 1 Cal.5th at p. 1120; *People v. Harris* (2005) 37 Cal.4th 310, 337.)

Martinez testified that, prior to the murder, he saw two guns—a revolver and a semiautomatic—and two holsters in Flores's apartment. Zamora was in the apartment. The murder was committed with a revolver. The evidence of the weaponry showed that, after the murder, the revolver was missing from Flores's apartment, and only the semiautomatic and the two holsters remained. The evidence was relevant to the issues of Zamora's "possession of the murder weapon" (*People v. Riser* (1956) 47 Cal.2d 566, 577, disapproved on another ground in *People v. Chapman* (1959) 52 Cal.2d 95, 98), his access to a gun of the type used in the murder, and the absence of the gun after the murder from where it had been. (See *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052 [evidence that the defendant possessed a gun that looked like the murder weapon was circumstantial evidence of guilt because it "did not merely show that defendant was a person who possesses guns, but showed he possessed a gun that might have been the murder weapon after the first and before the last of the killings"].) Moreover, the evidence of the gun and holsters in Flores's apartment was not the type of

evidence it is error to admit because it “tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons.” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1073; see *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056 “[w]hen the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant’s possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons”].) The guns and holsters were in Flores’s apartment, not Zamora’s.

Zamora relies on *People v. Riser*, *supra*, 47 Cal.2d 566, in which the defendant contended “that the admission in evidence of certain guns, holsters, belts, and shells was erroneous on the ground that they were not relevant to any issue in the case.” (*Id.* at p. 576.) The victim in *Riser* was killed with a Smith & Wesson .38 Special revolver, which was never recovered. (*Id.* at p. 573.) The police found three holsters, two leather belts holding 12 rounds of .38 special shells each, a box of .22 shells, and additional .38 special shells in the car of the defendant’s brother. The police also recovered a loaded Colt .38 revolver from defendant. (*Id.* at p. 576.)

Zamora cites the court’s statement in *Riser*: “When the prosecution relies . . . on a specific type of weapon, it is error to admit evidence that other weapons were found in [the defendant’s] possession. . . .” (*People v. Riser*, *supra*, 47 Cal.2d at p. 577.) This statement, however, did not apply to all of the evidence in *Riser*. Specifically, the court held the .38 special shells were admissible because they contained bullets matching those found at the murder scene, and one of the holsters was admissible because experts had testified “it had once carried a



Smith and Wesson .38 Special revolver.” (*Id.* at pp. 576-577.) On the other hand, the court held it was error to admit the Colt, the other two holsters, the belts, and the box of .22 shells because they had no connection to the commission of the crime. (*Ibid.*)

The evidence the court admitted here was akin to the .38 special shells and holster the court in *Riser* held was admissible. They had a connection to the crime: The semiautomatic, the revolver, and the holsters were present in Flores’s apartment while Zamora was there prior to the shooting, but the revolver was missing after the shooting. Thus, the evidence supported an inference that Zamora had access to the revolver, took it from the apartment, used it in the shooting, and disposed of it afterward. Unlike the Colt, other holsters, and .22 shells in *Riser*, the evidence here had relevance other than merely showing Zamora was the type of person who possessed guns, i.e., character evidence.<sup>10</sup>

E. *Zamora’s Prosecutorial Misconduct Argument Is Forfeited and Meritless*

During his closing argument, the prosecutor stated that the defense “painted the defendant as a child. Imagine that. Call him a child with broken teeth who acted out of confusion, hastiness, and rashness and ended up killing someone in either imperfect self-defense or during the heat of passion. But this child was just a month shy of his 18th birthday on June 16th, 2012. You’ll see his birth date in the medical records that you’ve been provided. This was no child. This was someone who was

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<sup>10</sup> Because the court did not abuse its discretion, the court did not violate Zamora’s constitutional rights. (See *People v. Sattiewhite* (2014) 59 Cal.4th 446, 472.)

acting selfishly that day.” Later, discussing Zamora’s actions as shown on the liquor store video, the prosecutor argued there was “[n]o hesitation on the part of Mr. Zamora. This may be a fresh-faced kid sitting here in court, but on that day he is a stone cold killer. You must disabuse yourselves of the notion that somehow youth makes you less culpable of a crime.” Counsel for Zamora did not object to these statements.

In her closing argument, counsel for Zamora told the jury that the prosecutor “sort of mocked me a little bit . . . by referring to my characterization of Mr. Zamora as a child. Legally he was a child. He was 17 years old. We were all 17 at one point. Some of us may have kids or grandkids that are 17. We know how teenagers think. Teenagers don’t deliberate. They just don’t.” Counsel for Zamora told the jury to keep that in mind when considering what the prosecutor had to prove in order to convict Zamora of first degree murder.

Zamora argues the prosecutor “misstated the law regarding the jury’s consideration of [his] youth.” He does not dispute the general rule that “a claim of prosecutorial misconduct is preserved for appeal only if the defendant objects in the trial court and requests an admonition, or if an admonition would not have cured the prejudice caused by the prosecutor’s misconduct.” (*People v. Blacksher* (2011) 52 Cal.4th 769, 829.) He suggests that we may nevertheless decide the issue. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [“[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party” and has discretion to reach such a question]; *People v. Denard* (2015) 242 Cal.App.4th 1012, 1031, fn. 10 [“where an otherwise forfeited claim presents an important question of constitutional law or a substantial right,

the appellate court may exercise discretion to review the claim”].) Zamora adds that, if we conclude that he forfeited the prosecutorial misconduct argument, then denial of effective assistance of counsel “must certainly follow.”

Zamora forfeited his argument the prosecutor committed misconduct. To the extent the prosecutor made any misstatement of law, any such misstatement was curable by objection and admonition, and nothing in the record suggests making an objection and requesting an admonition would have been futile. (See *People v. Centeno* (2014) 60 Cal.4th 659, 674; *People v. Williams* (2017) 7 Cal.App.5th 644, 686.)

Nor did counsel for Zamora provide ineffective assistance. Reversal for prosecutorial misconduct is required only if “the prosecutor’s comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process”” (*People v. Forrest* (2017) 7 Cal.App.5th 1074, 1086; see *People v. Fuiava* (2012) 53 Cal.4th 622, 679) or “it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted” (*People v. Clark* (2016) 63 Cal.4th 522, 576-577). To obtain reversal for ineffective assistance of counsel, “defendant must demonstrate a reasonable probability that, but for counsel’s deficiencies, the result would have been more favorable.” (*People v. Williams* (2013) 56 Cal.4th 630, 690.) Here, the jury *rejected* the prosecutor’s argument that Zamora was a stone cold killer by acquitting him of first degree murder and convicting him of only second degree murder in the death of Romero. The jury also acquitted Zamora of all charges as to Guzman. The jury found not true the allegations that Zamora murdered Romero in order to benefit a criminal street gang. The prosecutor’s statement that Zamora’s youth did not

make him less culpable did not infect the trial with unfairness, and it is not reasonably probable he would have obtained a more favorable verdict absent the prosecutor's statement. (See *People v. Williams*, *supra*, 7 Cal.App.5th at p. 684 [no prejudicial misconduct where jury acquitted the defendant of counts to which the improper questions related]; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1312 ["that defendant was acquitted of *any* of the offenses suggests the lack of prejudice and the jury's clear ability to consider each count on the evidence presented and nothing else"], disapproved on another ground in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12; cf. *People v. Smith* (2003) 30 Cal.4th 581, 617 [acquittal of one count suggested the jury's deliberations were not affected by prosecutor's allegedly improper questions].)

F. *The Trial Court Erred by Not Staying Execution of Sentence for Misdemeanor Escape from Arrest*

Zamora contends the trial court erred in imposing concurrent sentences on his convictions for escape from arrest and resisting an officer because both criminal acts were part of an indivisible and continuous course of conduct undertaken with a single intent and objective: escape. We agree with Zamora that section 654 prohibits punishing him for both offenses.

Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Whether section 654 applies is a question of fact for the trial court, which has broad latitude in making its

determination. (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1113; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1378.) We will uphold the trial court’s factual determinations if supported by substantial evidence. (*DeVaughn*, at p. 1113; *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.)

“The test for determining whether section 654 prohibits multiple punishment has long been established: ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’” (*People v. Ortiz, supra*, 208 Cal.App.4th at p. 1377.) “If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’” (*People v. Harrison* (1989) 48 Cal.3d 321, 335; accord, *People v. Mejia* (2017) 9 Cal.App.5th 1036, 1043.)

Under this test, both misdemeanor escape and resisting an officer were part of an indivisible course of conduct, and Zamora harbored a single criminal objective—escape from the deputies’ custody. As a general rule, section 654 applies to bar punishment for both offenses.

There are, however, exceptions to the general rule that a defendant may be punished only once for crimes committed as an indivisible course of conduct with a single objective. The People assert that one of these, the multiple-victim exception, applies here. Pursuant to this exception, “even though a defendant

entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim.’ [Citation.] The ‘multiple victim’ exception, like the other situations in which multiple punishment is permitted, is based on the greater culpability that attends commission of an act or acts of violence that may or do cause harm to more than one person.” (*People v. Deegan* (2016) 247 Cal.App.4th 532, 542.)

*People v. Martin* (2005) 133 Cal.App.4th 776 involved the application of the multiple-victim exception to the crime of resisting an officer. In *Martin*, four officers arrived at the scene after the defendant’s wife called the police following a domestic violence incident. The defendant was initially cooperative as the officers placed him under arrest and began escorting him to a patrol car, but he then attempted to escape, injuring one of the officers. The other officers knocked him to the ground and attempted to control him, while he resisted and kicked them. The defendant was convicted of both resisting arrest and battery on a peace officer, and the trial court imposed concurrent sentences for the two offenses. (*Id.* at pp. 779-780.)

On appeal, the defendant contended that, “because both offenses were incident to his sole objective to escape, section 654 precluded him from being punished for both.” (*People v. Martin, supra*, 133 Cal.App.4th at p. 780.) The People argued section 654 did not apply because there were multiple victims. (*Ibid.*) The court held the defendant’s “sole objective in both resisting arrest and committing battery on a police officer was to free himself. The battery upon the officer does not appear to have been intentional, but merely the result of [the defendant’s] physical gyrations aimed at freeing himself. The two offenses occurred, if

not concurrently, in close temporal proximity, which although not determinative on the question of whether there was a single objective, is a relevant consideration.” (*Id.* at p. 781.) Therefore, the court held that section 654 required the trial court to “stay execution of sentence of either resisting arrest or battery on a peace officer, unless the multiple-victim exception is applicable.” (*Ibid.*) The court further held that the multiple-victim exception applies if the crime “is defined to proscribe an act of violence against the person.” (*Id.* at p. 782.)

Zamora’s conviction for resisting an executive officer in violation of section 69 is subject to the multiple-victim exception to section 654 because the crime is one of violence against a person. (*People v. Martin, supra*, 133 Cal.App.4th at p. 782.) Zamora’s conviction of misdemeanor escape in violation of section 836.6, subdivision (b), however, is not. Section 836.6 provides that a person who violates subdivision (b) “is guilty of a misdemeanor, punishable by imprisonment in a county jail not to exceed one year. However, if the escape or attempted escape is by force or violence, and the person proximately causes a peace officer serious bodily injury, the person shall be punished by imprisonment in the state prison for two, three, or four years, or by imprisonment in a county jail not to exceed one year.” Thus, misdemeanor escape in violation of section 836.6, subdivision (b), of which Zamora was convicted, is not an offense “involving resisting an officer by ‘force or violence.’” (*People v. Martin, supra*, 133 Cal.App.4th at p. 782.) Because it is not a crime of violence against a person, the multiple-victim exception does not apply. Therefore, section 654 bars imposition of sentence for both misdemeanor escape and resisting an executive officer. (*Id.* at pp. 781, 783.)

G. *Zamora's Sentence Does Not Constitute Cruel and Unusual Punishment*

Finally, Zamora argues the imposition of a mandatory consecutive term of 25 years to life under section 12022.53, subdivision (d), for personally and intentionally discharging a firearm and causing death violates the constitutional proscription against cruel and unusual punishment. He argues the statute is unconstitutional on its face and as applied. Zamora acknowledges that the court in *People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498 and the court in *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1213-1214 rejected facial constitutional challenges to section 12022.53, subdivision (d). Zamora argues, however, that these cases were wrongly decided.

“[S]ection 12022.53 imposes progressive sentence enhancements of 10 years, 20 years, or 25 years to life, for progressively egregious firearm use applicable to certain enumerated felonies.” (*People v. Yang* (2010) 189 Cal.App.4th 148, 154.) “These enhancements vary in length, corresponding to various uses of a firearm”: 10 years for personal firearm use, 20 years for intentional and personal discharge of a firearm, and 25 years to life for intentional and personal discharge of a firearm that causes great bodily injury or death. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171.) “Section 12022.53 thus recognizes different degrees of culpability, and imposes ‘three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies.’” (*People v. Grandy* (2006) 144 Cal.App.4th 33, 42.) As the court in *Martinez* explained, “Lines must be drawn somewhere, and the Legislature has reasonably drawn the line at great bodily injury. The fact that subdivision (d) leaves no



additional room for trial court discretion based on different gradations of great bodily injury does not render the punishment cruel or unusual.” (*People v. Martinez, supra*, 76 Cal.App.4th p. 495.) We agree that section 12022.53, subdivision (d), is not unconstitutional on its face.

Zamora makes no particular argument to support his contention that section 12022.53, subdivision (d), is unconstitutional as applied to him. He states that we may “exercise [our] discretion to consider this contention on the merits in the interest of judicial economy,” as if it had been forfeited, and he argues that “the sentence imposed should be reversed and the matter remanded to allow the trial court to consider the sentence in light of this constitutional challenge.”

In fact, Zamora did argue at the sentencing hearing that a sentence of 40 years to life was cruel and unusual. The trial court rejected this argument, finding that a sentence of 40 years to life for a juvenile who committed murder did not constitute cruel and unusual punishment.

The trial court did not err. Zamora was involved in a fight. He went back to the scene of the fight with a gun and shot and killed one of the people with whom he had fought. It is fortuitous he did not kill Guzman or someone in the house his bullets struck. The trial court’s sentence did not violate either the federal or state constitutions. (See, e.g., *People v. Phung* (2017) 9 Cal.App.5th 866, 872-881 [17-year-old defendant’s sentence of 40 years to life for second degree murder with firearm enhancement was not cruel and unusual punishment]; *People v. Garcia* (2017) 7 Cal.App.5th 941, 949-950 [15-year-old defendant’s sentence of 32 years to life—seven years for attempted murder, 25 years to life for a firearm enhancement—was not cruel and unusual

punishment under federal or state constitution where, “[a]fter 32 years, [the] defendant will still be only approximately 47 years old, well within his life expectancy,” and “the recently enacted section 3051 guarantees defendant a youthful offender parole hearing after 25 years, when a 15-year-old offender would be approximately 40 years old”]; see also *People v. Franklin* (2016) 63 Cal.4th 261, 279-280 [parole eligibility at age 41 not the functional equivalent of life without possibility of parole].) The trial court here properly concluded that Zamora’s life expectancy was “substantially beyond his parole eligibility date.”

## DISPOSITION

Zamora’s sentence is modified to stay execution of sentence on count 4 pursuant to section 654 and to impose an enhancement of 25 years to life pursuant to section 12022.53, subdivision (d), on count 1. As modified, the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

SEGAL, J.

We concur:

PERLUSS, P. J.

SMALL, J.\*

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\*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.